STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2014
v	No. 316770 Clinton Circuit Court
WESLEY CHARLES MOORE, Defendant-Appellant.	LC No. 12-008956-FC

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a jury trial of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under age of 13). We affirm.

Defendant was accused of having sexual relations with the 10-year-old victim during a family gathering. The victim testified that after watching a movie with defendant, and after defendant told her he had a crush on her, the two performed oral sex on each other. A police detective interviewed defendant, who generally denied the allegations. The detective stated that upon questioning, defendant disclosed that he is "bipolar and schizophrenic" and is on medication, including Klonopin. The detective also interviewed two of the victim's friends, whom we designate witness 1 and witness 2, almost a year after the incident. He testified that both witnesses reported that the victim told them that a man touched her inappropriately and that witness 1 stated that it happened in a basement at someone's house.

Defendant moved for a new trial, arguing that he was denied the effective assistance of counsel when his counsel failed to object to the detective's testimony regarding his interview with witnesses 1 and 2 and his comments on defendant's mental illness. See generally *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). The court denied the motion, and defendant now raises these same two issues on appeal.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[F]indings of fact are reviewed for clear error" whereas "[q]uestions of constitutional law are reviewed by this Court de novo." *Id.* "This Court reviews for an abuse of discretion a trial court's decision to grant or

deny a motion for a new trial." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

This state has long recognized the importance of a criminal defendant's right to representation at trial. *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994). The right to effective assistance of counsel is grounded in the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Courts generally presume that counsel has afforded effective assistance, and it is the defendant who must overcome this burden. *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002). To establish an ineffective assistance of counsel claim, the defendant "must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms[,] . . . (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different," and (3) the result was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

Counsel generally has a duty to advocate the defendant's cause, consult with the defendant on important decisions, keep the defendant informed of significant developments in the case, and "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). But, "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. Nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, "[a] particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61. Trial strategy can involve the decision to make objections at trial, the presentation of evidence, and the examination of witnesses. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *Matuszak*, 263 Mich App at 58

Defendant argues that counsel should have objected to testimony from the detective regarding statements given to him by witness 1 and 2 because they were inadmissible hearsay. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The admission of hearsay statements can violate the Confrontation Clause of the United States Constitution, US Const Am VI, if they are testimonial, *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), that is, if the statements were made with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution, *People v Walker (On Remand)*, 273 Mich App 56, 61; 728 NW2d 902 (2006).

The detective gathered the statements from witnesses 1 and 2, almost a year after the incident took place, in preparation for bringing charges against defendant. At trial, the prosecution offered the out-of-court statements for the purpose of proving that the victim disclosed the sexual assault to her friends. As a result, and as the prosecution conceded before the trial court, the statements constitute testimonial hearsay.

Assuming defense counsel's failure to object was not part of a reasonable trial strategy, we nevertheless hold that he has not established that but for his counsel's failure to object the outcome of the trial would have been different. *Matuszak*, 263 Mich App at 58. Like many CSC

cases involving a minor, this case came down to a "he said, she said" as to what occurred, if anything, on the night in question. The victim gave very detailed testimony about what occurred before and during the incident, and the jury was provided an opportunity to believe defendant's version. Indeed, defendant put in evidence that he did not commit the acts, that he was not alone with the victim long enough to accomplish the act, and that the victim's description of defendant's genital area was inaccurate. Despite this, the jury believed the victim's descriptive evidence. Hence, we hold that even without the improperly admitted evidence (which though somewhat confirming that an incident occurred, was otherwise vague), the jury had more than enough evidence to believe the victim and convict defendant.

For much the same reason, although the detective's testimony on what defendant reported concerning his mental health was irrelevant, defense counsel's failure to object does not constitute ineffective assistance. Plaintiff did not argue that defendant committed the offense because he suffers from bipolar disorder or schizophrenia. Nor did plaintiff argue or suggest that defendant's actions or account of the incident was tainted by his medication. And, as noted previously, the evidence presented of defendant's guilt was substantial.

Next, defendant argues that MCL 750.520b(2)(b) is an unconstitutional violation of the separation of powers doctrine[1] because it aggregates all sentencing power in the legislative and executive branches of government, leaving the judiciary with no discretion at sentencing to distinguish one offender from another. We review questions of constitutional law de novo. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999).

Defendant's constitutional challenge fails because sentencing authority does not fall exclusively within the power of the judiciary. Contrary to defendant's assertion, "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature," *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), and the role of the judiciary is to impose and administer the sentencing statutes as enacted, *id*. at 436-437. As a result, "[t]he separation of powers clause . . . is not offended by the Legislature delegating sentencing discretion in part and retaining sentencing discretion in part." *People v Hall*, 396 Mich 650, 658; 242 NW2d 377 (1976). As explained in *People v Garza*, 469 Mich 431, 434; 670 NW2d 662 (2003):

> In various eras, and with regard to various offenses, the Legislature has chosen to delegate various amounts of sentencing discretion to the judiciary. At present, for instance, there are offenses with regard to which the judiciary has no sentencing discretion, offenses about which discretion is sharply limited, and offenses regarding which discretion may be exercised under the terms set forth in the sentencing guidelines legislation. In previous years, before the 1999 effective

[1] "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2.

> date of the legislative sentencing guidelines, the Legislature provided sentencing discretion that in many instances was virtually without limit.
>
> All this is for the Legislature to decide.

Through this statute the Legislature has chosen to limit a trial court's sentencing discretion where the defendant has been convicted of CSC I. This is not an unconstitutional violation of the separation of powers doctrine. Rather, the Legislature has simply exercised its constitutional authority to prescribe the punishment for a particular offense. The circuit court is permitted to exercise judicial discretion under MCL 750.520b(2)(b), but "only *within the limits* set by the Legislature." *Hegwood*, 465 Mich at 437 (emphasis in original).

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Christopher M. Murray